Nos. 93-1748 and 93-1757

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

LILLIAN SOLOMON, *et al.*,

Petitioners,

v.

RESOLUTION TRUST CORPORATION, AS RECEIVER FOR NASSAU SAVINGS AND LOAN ASSOCIATION, F.A.,

Respondent.

SUSAN SOLOMON PATTULLO, *et al.*,

Petitioners,

v.

RESOLUTION TRUST CORPORATION, AS RECEIVER FOR NASSAU SAVINGS AND LOAN ASSOCIATION, F.A.,

Respondent.

On Petitions For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

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BRIEF OF REPRESENTATIVES GARY L. ACKERMAN, SHERWOOD L. BOEHLERT, ELIOT L. ENGEL, HAMILTON FISH, JR., FLOYD H. FLAKE, MAURICE D. HINCHEY, NITA M. LOWEY, CAROLYN B. MALONEY, THOMAS J. MANTON, JERROLD NADLER, MAJOR R. OWENS, CHARLES B. RANGEL, CHARLES E. SCHUMER, JOSE E. SERRANO, EDOLPHUS TOWNS, AND NYDIA VELAZQUEZ AS AMICI CURIAE SUPPORTING PETITIONERS

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QUESTION PRESENTED

Whether 12 U.S.C. § 1821(e) (Supp. V 1993), which authorizes the Resolution Trust Corporation to "repudiate any contract or lease" to which a failed savings and loan institution is a party, preempts state rent control laws that protect statutory tenants from eviction.

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IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1993

NO. 93-1748

LILLIAN SOLOMON, *ET AL.*, PETITIONERS

v.

RESOLUTION TRUST CORPORATION, AS RECEIVER FOR NASSAU SAVINGS AND LOAN ASSOCIATION, F.A., RESPONDENT

NO. 93-1757

SUSAN SOLOMON PATTULLO, *ET AL.*, PETITIONERS

v.

RESOLUTION TRUST CORPORATION, AS RECEIVER FOR NASSAU SAVINGS AND LOAN ASSOCIATION, F.A., RESPONDENT

ON PETITIONS FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF OF REPRESENTATIVES GARY L. ACKERMAN, SHERWOOD L. BOEHLERT, ELIOT L. ENGEL, HAMILTON FISH, JR., FLOYD H. FLAKE, MAURICE D. HINCHEY, NITA M. LOWEY, CAROLYN B. MALONEY, THOMAS J. MANTON, JERROLD NADLER, MAJOR R. OWENS, CHARLES B. RANGEL, CHARLES E. SCHUMER, JOSE E. SERRANO, EDOLPHUS TOWNS, AND NYDIA VELAZQUEZ AS *AMICI CURIAE* SUPPORTING PETITIONERS

INTEREST OF AMICI CURIAE

Amici curiae are members of the United States House of Representatives who represent citizens of the State of New York. The *amici* have a strong interest in ensuring that New York citizens who are protected by the State's rent-control and rent-stabilization laws are not evicted from their homes. In addition, the *amici* have an interest in the proper interpretation of the Financial Institutions Reform, Recovery and Enforcement Act of 1989 ("FIRREA"), Pub. L. No. 101-73, 103 Stat. 183. Federal courts should not lightly conclude that Congress has preempted state laws that address important and traditional issues of local concern such as the regulation of housing. As discussed below, the provision of FIRREA that confers on the Resolution Trust Corporation ("RTC") authority to "repudiate any contract or lease" of a failed savings and loan institution should not be interpreted to permit the RTC to extinguish rights of statutory tenants that are conferred by state law and that cannot be altered by a contract or lease.

STATEMENT

1. From 1946 to the present, the State of New York has enacted a series of laws to address a persistent housing emergency in New York City and other parts of the State. New York law currently provides for two types of rent regulation, rent control and rent stabilization. See N.Y.C. Admin. Code §§ 26-401 to 26-415 & 26-501 to 26-520. Under both types of regulation, rent increases are governed by statute, and tenants may not be evicted except in circumstances specified by law. Pet. App. 5a-7a.[1/]

[1/] References to "Pet. App." in this brief refer to the appendix to the petition for a writ of certiorari in No. 93-1757.

Under New York's rent control laws, tenants are protected "notwithstanding the fact that the tenant has no lease or that his or her lease, or other rental agreement, has expired or otherwise terminated, notwithstanding any contract, lease agreement, or obligation heretofore or hereafter entered into which provides for surrender of possession, or which otherwise provides contrary hereto." N.Y.C. Admin. Code § 26-408.a (1992). Tenants subject to the rent stabilization laws enjoy similar protection. Although the rent stabilization laws, unlike the rent control laws, contemplate the use of leases as a mechanism for increasing rents, the absence of a lease merely prevents the landlord from increasing the rent and does not affect the tenants' rights under state law. See N.Y. City Rent Stabilization Code § 2522.5(b)(2).

2. Petitioners include the Attorney General of the State of New York, the State's Division of Housing and Community Renewal ("DHCR") and its Commissioner, and rent-controlled or rent-stabilized tenants who reside in a building at 444 East 57th Street in New York City. In 1983, the building was converted from rental apartments to condominiums pursuant to a "non-eviction" plan under New York's Martin Act, N.Y. Gen. Bus. Law § 352-eeee(2)(c) (McKinney 1987). In accordance with that Act, the tenants were notified that they could elect not to purchase their apartments, and if they made that choice they had the right to continue as statutory tenants protected by New York's rent control and rent stabilization laws. Petitioners chose not to purchase their apartments. Pet. App. 8a-9a.

In 1984, the owner of the building pledged nine apartments to Nassau Federal Savings and Loan Association as collateral for a loan of $3.2 million. The owner defaulted in 1987, and title to the nine apartments passed to Nassau. Nassau encountered financial difficulties, and in March 1990 the Office of Thrift Supervision ("OTS") appointed the RTC

as receiver for Nassau. The OTS subsequently ordered that Nassau be closed and directed the RTC to dispose of its assets. Pet. App. 9a.

The nine apartments were appraised at $2,837,400 subject to the existing tenancies (slightly less than the outstanding loan balance of $3,035,711), or $7,565,000 if the tenants could be removed. R. 233. In the summer of 1990, the RTC determined that the nine tenancies were burdensome, and sent letters to each tenant notifying them that it was repudiating their tenancies pursuant to 12 U.S.C. § 1821(e)(1) (Supp. V 1993).[2/] The letters informed the tenants that they had the option of treating the tenancy as terminated, remaining in possession for the balance of the lease, or purchasing their apartment on stated terms. Pet. App. 9a-10a.

The tenants disputed the agency's power to repudiate the tenancies. Several tenants filed complaints with petitioner DHCR, and New York's Attorney General protested by letter that the RTC had no authority to repudiate tenancies protected by New York law. In response, the RTC issued a statement

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[2/] Section 1821(e)(1) provides:

> In addition to any other rights a conservator or receiver may have, the conservator or receiver for any insured depository institution may disaffirm or repudiate any contract or lease --
>
> (A) to which such institution is a party;
>
> (B) the performance of which the conservator or receiver, in the conservator's or receiver's discretion, determines to be burdensome; and
>
> (C) the disaffirmance or repudiation of which the conservator or receiver determines, in the conservator's or receiver's discretion, will promote an orderly administration of the institution's affairs.

announcing that, as a matter of policy, it will not repudiate the leases of tenants whose income does not exceed 115% of the median income in New York City. Pet. App. 10a-11a.

3. In February 1991, the RTC brought a declaratory judgment action against the Attorney General of New York, the Commissioner of the DHCR, and the nine individual tenants, seeking to establish that it has authority under § 1821(e)(1) to repudiate the tenants' leases. Shortly thereafter, the State of New York brought a separate action challenging the RTC's authority to disregard New York statutes that regulate the rights of rental tenants. Pet. App. 11a.

The district court consolidated the two actions and granted New York's motion for summary judgment. Pet. App. 36a-58a. The court held that the RTC lacked authority under 12 U.S.C. § 1821(e)(1) to repudiate the tenancies. The court reasoned that the "presumption against preemption applies especially where the state law said to be preempted is within the traditional police powers of the states." Pet. App. 42a (citing *Pacific Gas & Elec. Co.* v. *State Energy Resources Conservation & Dev. Comm'n*, 461 U.S. 190, 206 (1983)).

The court rejected the RTC's argument that the "any contract or lease" language of § 1821(e)(1) applies to the statutory tenancies at issue in this case. The court held that the phrase "contract or lease" "does not include rights of occupancy created by state statute and independent of any contract or lease between the landlord and tenant." Pet. App. 51a. The court explained that, under New York law, tenants "enjoy a protection from eviction that is independent of any lease that may exist between landlord and tenant." *Id.* at 45a.

The court further concluded that "while rent-stabilized tenants, unlike rent-controlled tenants, do hold leases . . .

[t]he leases merely provide a means for periodically increasing the rents landlords are allowed to charge." Pet. App. 46a (citations omitted). Thus, "even if RTC repudiated the leases of rent-stabilized tenants, . . . those tenants would still enjoy statutory rights to remain in possession of their apartments indefinitely and without a rent increase." *Id.*

4. The court of appeals reversed. Pet. App. 1a-35a. The court stated that "[t]his appeal . . . turns on whether the tenancies in question are contractual in nature," Pet. App. 14a, and that "[f]or these purposes, the definition of the phrase 'contract or lease' is a matter of federal law." *Id.* at 15a (citations omitted). The court added, however, that it would "consult for guidance the body of New York law concerning the design and operation of the rent regulation programs at issue." *Id.*

The court held that "New York's statutory tenancies . . . are contract based leaseholds" that "fall within the express language of § 1821(e)." Pet. App. 22a. The court acknowledged that "New York's rent stabilization laws regulate the two terms at the core of the landlord-tenant relationship: rent and duration." *Id.* at 17a. The court nevertheless concluded that "the tenancy retains much of the character of a voluntary contract," and therefore is subject to § 1821(e). *Id.* at 18a.

Although the court recognized that "New York's rent control statute does not contemplate or require a current written lease," *id.*, it cited authority for the proposition that some of "the terms of the last written lease continue to remain in effect under rent control," Pet. App. 19a-20a (citations omitted), and concluded that "[r]ent control, like rent stabilization, affects the lease by statutorily altering and specifying certain terms." *Id.* at 21a.

The court also rejected petitioners' argument that they are entitled to remain in their apartments under 12 U.S.C. § 1821(e)(5)(A)(ii), which provides that a tenant may "remain in possession of the leasehold interest for the balance of the term of the lease." The court acknowledged that New York's statutory tenancies do not run for any specified term, but viewed the landlord's statutory right to review the maximum base rent once every two years as "analogous" to a lease term, and therefore held that the term of petitioners' statutory tenancies for purposes of FIRREA is two years. Pet. App. 26a-29a.[3/]

REASONS WHY THE PETITION SHOULD BE GRANTED

1. This case presents an issue of great importance to the State of New York and its citizens. New York has adopted rent control and rent stabilization laws to address a public housing emergency in New York City and elsewhere in the State. See N.Y.C. Admin. Code §§ 26-401, 26-501. The court of appeals' decision undermines the State's ability to regulate the housing of its own citizens. As a result of the court of appeals' decision, many individuals and families now face a risk of eviction from their homes despite New York

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[3/] The court also rejected petitioners' arguments that the leases are not burdensome, Pet. App. 29a-30a, that the RTC had violated its duty to consider the impact of its action on local communities, *id.* at 30a-31a, and that repudiation of the statutory tenancies is a taking of property without just compensation, *id.* at 32a. Because the court concluded that § 1821(e) expressly authorizes the RTC to repudiate the tenancies, it did not address whether there is a conflict between FIRREA and New York's rent control laws. *Id.* at 32a-33a. Finally, the court held (*id.* at 33a-34a) that the district court properly refused to grant summary judgment on Petitioner Ribner's claim that he holds his statutory tenancy by succession from his mother. *Id.* at 33a-34a.

laws that grant them a right to remain in their apartments indefinitely.[4/]

The questions presented are also of national importance. Approximately ten percent of all rental housing units in the United States are subject to some form of rent control. See U.S. Dep't of Housing and Urban Development, Office of Policy Development and Research, *Report to Congress on Rent Control* 1 (1991). In addition, the court of appeals' decision has broad implications for other state laws that may be connected in some way to a contract or lease. For example, the court of appeals' decision supports the conclusion that the RTC need not comply with state laws setting minimum standards for landlords as long as it first repudiates the tenants' leases. See Pet. App. 16a (discussing warranty of habitability).

2. This Court has granted review to resolve conflicting interpretations of related or similar statutory provisions. See *Begier* v. *IRS*, 496 U.S. 53, 57 n.2 (1990). The court of appeals' decision creates two such conflicts.

a. The court of appeals' interpretation of the statutory terms "any contract or lease" conflicts with decisions of two other courts of appeals interpreting the functionally identical term "agreement" in a related statutory provision, 12 U.S.C.

[4/] As of February 1991, the RTC controlled approximately 1,000 rent-regulated apartments in the State of New York, and expected an additional 1,000 rent-regulated apartments to come under its control within the next year. See Pet. App. 52a n.5. In addition, the FDIC owns many apartments in New York that are subject to the court of appeals' ruling.

§ 1823(e) (Supp. V 1993).[5/] In *Patterson* v. *FDIC*, 918 F.2d 540 (1992), the Fifth Circuit held that § 1823(e) did not prevent a Texas resident from asserting a homestead claim as a defense against foreclosure by the FDIC. Although the deed of trust contained an express disclaimer of rights under Texas law, 918 F.2d at 541, the court reasoned that the "homestead right exist[s] independent of any agreement between the parties," and that the term "agreement" in § 1823(e) could not be construed to permit the FDIC to abrogate rights conferred by state law. 918 F.2d at 543-44 (internal quotation omitted). In reaching this conclusion, the Fifth Circuit rejected the government's contention that it could not consider state law in defining the term "agreement" under § 1823(e). Applying the three-factor test of *United States* v. *Kimbell Foods, Inc.*, 440 U.S. 715 (1979), the court "decline[d] to establish federal common law that would abrogate the well-established Texas law . . . protecting its citizens' homesteads." 918 F.2d at 544.

[5/] Section 1823(e) provides:

> No *agreement* which tends to diminish or defeat the interest of the [RTC] in any asset acquired by it under this section . . . either as security for a loan or by purchase . . ., shall be valid against the [RTC] unless such an agreement --
>
> (1) is in writing,
>
> (2) was executed by the [bank] and any person claiming an adverse interest thereunder, including the obligor, contemporaneously with the acquisition of the asset by the [bank],
>
> (3) was approved by the board of directors of the [bank] or its loan committee, which approval shall be reflected in the minutes of said board or committee, and
>
> (4) has been, continuously, from the time of its execution, an official record of the [bank].

12 U.S.C. § 1823(e) (emphasis added). This statute codifies the doctrine of *D'Oench, Duhme & Co.* v. *FDIC*, 315 U.S. 447 (1942).

Similarly, in *Bateman* v. *FDIC*, 970 F.2d 924 (1st Cir. 1992), the First Circuit held that § 1823(e) did not deprive a contractor of the benefit of a mechanic's lien on property subject to a preexisting mortgage. Chief Judge Breyer's opinion for the court applied state law, in accordance with the principle that "state law will govern matters such as priorities (within the context of a relevant federal program) unless a need for national uniformity, or a need to protect the federal program's objectives, outweighs the commercial confusion (and unfairness) that abandoning ordinary state property law might cause." 970 F.2d at 928 (citation omitted).

b. The court of appeals' decision also conflicts with decisions interpreting 11 U.S.C. § 365(a) (1988), a provision of the Bankruptcy Code that authorizes bankruptcy trustees to repudiate any "contract" or "lease." 11 U.S.C. § 365(a).[6/] As the court of appeals recognized, § 1821(e) is "closely modeled on parallel provisions of section 365 of the Bankruptcy Code." Pet. App. 25a (quoting S. Rep. No. 19, 101st Cong., 1st Sess. at 314 (1989)). See also *1185 Ave. of the Ams. Assocs.* v. *RTC*, No. 93-7810, 1994 U.S. App. Lexis 8732 at *10 (2d Cir., Apr. 26, 1994) (describing similarities between a trustee in bankruptcy and the RTC as conservator or receiver). The Seventh Circuit has held that a bankruptcy trustee must comply with state rent control laws even after a lease is repudiated by the trustee under § 365. *In re Chicago, R.I. & Pac. R.R.*, 772 F.2d 299, 302-03 (7th Cir. 1985), *cert. denied*, 475 U.S. 1047 (1986). See also *Saravia* v. *1736 18th St., N.W., Ltd. Partnership*, 844 F.2d 823, 827 (D.C. Cir. 1988) (bankruptcy trustee's power to repudiate a "contract" or "lease" under § 365 does not "implicate public obligations,"

[6/] Section 365(a) provides that, with stated exceptions, "the trustee. . . may assume or reject any executory contract or unexpired lease of the debtor."

but extends only to "lease covenants [that] go beyond the requirements of law.") This is consistent with the general principle, also recognized by the courts of appeals, that state law determines whether a legal interest falls within the definition of a "contract" or "lease" for purposes of § 365. See *In re Topco, Inc.*, 894 F.2d 727, 739 n.17 (5th Cir. 1990); *In re Streets & Beard Farm Partnership*, 882 F.2d 233, 235 (7th Cir. 1989).[2/]

c. The court of appeals' decision also conflicts with decisions of this Court. "Consideration of issues under the Supremacy Clause 'start[s] with the assumption that the historic police powers of the States [are] not to be superseded by . . . Federal Act unless that [is] the clear and manifest purpose of Congress.'" *Cipollone* v. *Liggett Group, Inc.*, 112 S. Ct. 2608, 2617 (1992) (quoting *Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)). Indeed, this Court recently stated that "[t]o displace traditional State regulation . . ., the federal statutory purpose must be clear and manifest," and that absent such a clear and manifest purpose, federal law "will be construed to adopt, rather than to displace, pre-existing state law." *BFP* v. *RTC*, No. 92-1370, slip op. 13-14 (May 23, 1994) (internal quotations and citations omitted). The district court's decision expressly

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[2/] The court of appeals distinguished § 365 on the basis of 11 U.S.C. § 365(h)(1) (1988), which provides that "[i]f the trustee rejects an unexpired lease of real property . . .the lessee . . . may remain in possession of the leasehold . . . for the balance of such term and for any renewal or extension of such term that is enforceable by such lessee . . . under applicable nonbankruptcy law." See Pet. App. 24a-25a. But that provision does not state that "nonbankruptcy law" determines what is a "contract" or "lease" under Section 365(a), and the courts of appeals have not relied on Section 365(h)(1) in concluding that "contract" or "lease" refers to state law.

relied on this settled principle, see Pet. App. 42a, but the court of appeals simply ignored it.

The court of appeals' decision is also contrary to decisions of this Court holding that when Congress uses a term that is "deeply rooted in state traditions, customs, habits, and laws," the courts should adopt state law to define the term. *RFC* v. *Beaver County*, 328 U.S. 204, 210 (1946). See, *e.g.*, *United States* v. *Brosnan*, 363 U.S. 237, 240-42 (1960) (applying state law to define "real property" and "property and rights to real property"). The reasons for adopting state law are "particularly strong in areas in which private parties have entered legal relationships with the expectation that their rights and obligations would be governed by state-law standards." *Kamen* v. *Kemper Fin. Servs.*, 500 U.S. 90, 98 (1991).

Finally, the court of appeals' decision is in sharp tension with at least four aspects of this Court's recent decision in *O'Melveny & Myers* v. *FDIC*, No. 93-489 (June 13, 1994) (holding that state law, rather than federal law, governs tort actions brought by the FDIC as receiver of a federally-insured bank against attorneys who provided services to the bank). First, *O'Melveny* unanimously rejected the government's contention that "federal law governs questions involving the rights of the United States arising under federal programs." Slip op. 5. The Court observed that "the FDIC is not the United States, and even if it were we would be begging the question to assume that it was asserting its *own* rights rather than, as receiver, the rights of [the bank]." *Id.* at 5-6 (emphasis in original). Second, the Court concluded that the statutory provision at issue in *O'Melveny* — which provided that the FDIC or the RTC, as receiver, "succeed to . . . all rights . . . *of the insured depository institution*." 12 U.S.C. § 1821(d)(2)(A)(i) (Supp. V 1993) (emphasis added) — "places the FDIC in the shoes of the insolvent S&L, to work

out its claims under state law." Slip op. 7. A parallel analysis applies to § 1821(e)(1), which refers to "any contract or lease . . . *to which such [insured depository] institution is a party*." (Emphasis added). Third, the Court's opinion in *O'Melveny* stated that it would not "adopt a court-made rule to supplement federal statutory regulation that is comprehensive and detailed," because "matters left unaddressed in such a scheme are presumably left subject to the disposition provided by state law." Slip op 6 (citing authorities). That principle applies here, because FIRREA "left unaddressed" the definition of "contract or lease," terms that have settled meanings under state law. Fourth, the Court flatly rejected the FDIC's argument that courts should consider whether applying state law would "deplet[e] the deposit insurance fund." Slip op. 9 (internal quotation omitted). The court of appeals, in contrast, appears to have been influenced by precisely that concern. See Pet. App. 26a (finding "every reason for Congress to strengthen RTC's hand in remedying a national economic emergency").

3. The text and structure of FIRREA indicate that Section 1821(e) was intended to provide the RTC with protection from agreements made by the savings institution, but not from generally applicable laws of the State. First, Congress demonstrated that it knew how to preempt state law when it wanted to do so. It included a number of express preemption provisions in FIRREA, but did not include such a provision § 1821(e). See, *e.g.*, 12 U.S.C. §§ 1464(p), 1821(m)(10), 1823(k)(1)(A)(i). Second, Congress defined a variety of terms used in FIRREA, but it did not adopt a federal definition of the terms "contract" or "lease." See 12 U.S.C. § 1813 (1988; Supp. V 1993). Third, the legislative history states that FIRREA "grants the FDIC [and the RTC] as conservator or receiver certain rights and powers of a receiver in equity, including the right to repudiate contracts." H.R. Conf. Rep. No. 222, 101st Cong., 1st Sess. 397 (1989).

As explained above, see pp. 10-11 *supra*, a receiver in equity has no power to evict tenants protected by State rent control laws.

If the court of appeals had properly applied New York law, it would have concluded that petitioners' rights as statutory tenants do not arise under a "contract or lease." Under New York law, it is well-settled that the rights of statutory tenants are not contractual in nature. See *Whitmarsh* v. *Farnell*, 83 N.E.2d 543, 547 (N.Y. 1949) (tenant's "occupancy of the apartment after his lease expired was not under any agreement express or implied but by virtue of a compulsion exerted on the landlord by the local emergency rent law"); *Stern* v. *Equitable Trust Co.*, 144 N.E. 578, 578 (N.Y. 1924) (same); *Park Summit Realty Corp.* v. *Frank*, 434 N.Y.S.2d 73 (App. Div. 1980) (same), *aff'd*, 448 N.Y.S.2d 414 (App. Div. 1981), *aff'd*, 439 N.E.2d 358 (N.Y. 1982); *De Santis* v. *White Rose Assocs.*, 578 N.Y.S.2d 363, 367 (N.Y. Sup. Ct. 1991) (same).

Moreover, the court of appeals' definition of the term of petitioners' lease is contrary to New York law, which provides that statutory tenancies last "so long as [the tenant] continues to pay the rent." N.Y.C. Admin. Code § 26-408a; see *130 W. 57 Corp.* v. *Hyman*, 66 N.Y.S.2d 332, 334 (App. Div. 1946) ("So long as a tenant continues to pay the rent . . . he may not be removed from the premises").[8/]

4. In the alternative, the Court may wish to grant the petitions for certiorari, vacate the decision of the court of

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[8/] The court of appeals' decision is also internally inconsistent. The court held that a statutory tenancy is a "lease" for purposes of 12 U.S.C. § 1821(e)(1), but that the term of the statutory tenancy is not the term of the lease for purposes of § 1821(e)(5). See Pet. App. 22a, 26a-29a.

appeals, and remand for further consideration in light of this Court's recent decisions in *BFP* v. *RTC*, No. 92-1370 (May 23, 1994) and *O'Melveny & Myers* v. *FDIC*, No. 93-489 (June 13 1994). As noted above, see p. 11 *supra*, the Court's opinion in *BFP* contains a particularly strong statement of the principle that "where the intent to override is doubtful, our federal system demands deference to long established traditions of state regulation." Slip op. 15. The court of appeals failed to discuss that principle at all; it might well reach a different result upon reconsideration in the light of *BFP*. *O'Melveny*, as noted above, see pp. 12-13 *supra*, construed a provision of FIRREA with a parallel structure, applied a presumption that matters not addressed by FIRREA are left to state law, and rejected the argument that the powers of the FDIC and the RTC should be defined to further a federal interest in avoiding "deplet[ion] of the deposit insurance fund." Slip op. 9. Each of those features of *O'Melveny* undermines the court of appeals' decision in this case, and suggests that the court of appeals might reach a different result upon reconsideration.

CONCLUSION

The petitions for a writ of certiorari should be granted. In the alternative, the petitions should be granted, the decision of the court of appeals vacated, and the case remanded for further consideration in light of this Court's decisions in *BFP* v. *RTC*, No. 92-1370 (May 23, 1994) and *O'Melveny & Myers* v. *FDIC*, No. 93-489 (June 13, 1994).

Respectfully submitted,

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